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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ABRAHAM MINKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 16-21) is reported at 217 F. 2d 350. The memorandum opinion of the District Court in the prior proceedings to quash the subpoena, *In re Minker*, is reported at 118 F. Supp. 264.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1954 (R. 21), and a petition for rehearing was denied on January 6, 1955 (R.

22). On January 29, 1955, by order of Mr. Justice Burton (R. 22), the time for filing a petition for a writ of certiorari was extended to March 7, 1955. The petition was filed on February 28, 1955, and was granted on April 11, 1955 (R. 23; 349 U.S. 904). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the subpoena power conferred by Section 235 (a) of the Immigration and Nationality Act of 1952, an immigration officer, in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings, may subpoena the naturalized citizen who is the subject of the inquiry.

STATUTE AND REGULATIONS INVOLVED

Pertinent portions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, and the applicable regulation of the Immigration and Naturalization Service are set forth as an Appendix, *infra*, pp. 50-60.

STATEMENT

In connection with an investigation to determine whether good cause existed for the institution of a proceeding pursuant to Section 340 (a) of the Immigration and Nationality Act of 1952 to cancel respondent's 1945 naturalization, the District Director of the Immigration and Naturalization Service at Philadelphia, Pennsylvania, issued a subpoena under Section 235(a) of the Act, com-

manding respondent to appear and testify at the office of the Service in Philadelphia. The subpoena was captioned "In re Abraham Minker" and required respondent's presence on September 16, 1953. (R. 3.) Before that date, respondent filed a motion in the United States District Court for the Eastern District of Pennsylvania, seeking to have the subpoena quashed on the grounds (1) that it did not disclose the nature of the investigation, (2) that it was unauthorized by statute, and (3) that its provisions were unreasonable and oppressive (R. 12). At the argument on the motion, the Government disclosed that the object of the administrative inquiry was to determine whether respondent's 1945 naturalization was vulnerable, and that the testimony sought from respondent concerned only himself. The motion to quash was denied (R. 16; *In re Minker*, 118 F. Supp. 264), and respondent did not appeal from that order.

The District Director thereupon notified respondent to appear on January 5, 1954, in accordance with the terms of the original subpoena (R. 4). Upon his failure to comply, the District Court, on application of the District Director, entered an order on March 29, 1954, requiring respondent to appear and testify in the administrative proceedings (R. 5). Respondent's disregard of this order led to the entry by the District Court of an order to show cause why he should not be adjudged in contempt (R. 9). After hearing on the order to show cause, on June 3, 1954, respondent was adjudged in contempt and fined $500 (R. 9-10).

On appeal, the judgment was reversed (R. 21). The Court of Appeals, although considering the proceeding to be one "concerning [a] matter which is material and relevant to the enforcement of this Act and the administration of the Service" within the purview of Section 235 (a) (R. 18), held that the subject of an administrative denaturalization investigation is not a "witness" within the meaning of that section (R. 20-21).

SUMMARY OF ARGUMENT

While it held that a potential party to a denaturalization proceeding is not a "witness" within Section 235(a) of the Immigration and Nationality Act of 1952 (*infra*, pp. 51-53), the court below agreed with the Second and Fifth Circuits that the general subpoena power conferred by that section applies in investigations of possible grounds for denaturalization. However, since the latter holding is disputed, we undertake first to demonstrate that the three courts of appeals are correct on this broad proposition, postponing to our second point the narrower ground on which the court below held respondent in this case immune from subpoena.

I

A. The plain language of Section 235(a)—empowering the Attorney General and any immigration officer to subpoena witnesses for testimony "concerning any matter which is material and relevant to the enforcement of this Act"—authorizes the use of a subpoena in the investigation of

grounds for denaturalization. The Act, to the whole of which Section 235(a) applies, combines for the first time in a single statute the formerly separate subjects of immigration, nationality, and naturalization. Since the Act includes provisions for denaturalization (Section 340(a)), and since the Attorney General is responsible for enforcement of this as well as the rest of the Act (Section 103(a)), an investigation in this area is a "matter" covered by Section 235(a). The point may be demonstrated by comparing this section with the provision from which it derived, Section 16 of the Immigration Act of 1917 (39 Stat. 885, 8 U. S. C., 1946 ed., 152). The latter provision granted the subpoena power merely to district directors and inspectors in charge, and only with respect to matters "touching the right of any alien to enter, reenter, reside in, or pass through the United States * * *." Section 235(a), repeating the foregoing language, then adds the general subpoena power "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service," and confers the power upon the Attorney General, whose enforcement duties cover the whole range of the Act. This deliberate addition argues powerfully for the usual assumption that Congress meant what it said and that Section 235(a) applies to all investigations, like the one in this case, concerned with enforcement of the Act.

B. The legislative history buttresses this con-

clusion. The general language of Section 235(a) was added on the recommendation of the Immigration and Naturalization Service, which worked closely with the responsible committees during the long consideration and study preceding enactment of the statute. It was made perfectly clear that the change was designed to authorize subpoenas for citizens as well as aliens and to require testimony concerning "any matter which is material and relevant to the administration of this Act and of the Service". There can be no such showing of inadvertence as could remotely suggest that the language should be applied to less than all the investigative functions it plainly covers. And investigations of possible cases of "good cause" for proceedings to revoke naturalization constitute a familiar and long-recognized function of the Immigration Service, both before and since its placement under the Attorney General. In its passage of the 1952 Act Congress broadened this area of responsibility and expressed its purpose to increase the duties of administrative investigation in enforcement of the naturalization provisions. The unambiguous language of Section 235(a), read in this setting, unquestionably authorizes the use of subpoenas for inquiry into possible grounds for revoking naturalization.

II

The court below erred in holding that, although the subpoena power under Section 235(a) applies to investigations to determine the validity of

naturalization decrees, it may not be employed to subpoena a person whose status is in question. Such a person is plainly within the category of "witnesses" under Section 235(a), and there is no ground in the statute, in precedent, or in policy for the exception the court announced.

A. Failing to distinguish between administrative investigations and administrative or judicial hearings, the court below found the term "witnesses" insufficient to include a person who might, following an investigation, become a "party." But there are in fact no "parties" to the administrative investigation. There is no litigated issue and no adjudication or "decision" of any kind. All who are called to testify are fully and accurately described as "witnesses." Other sections of the Act, which refer separately to "witnesses" and "petitioners" or "aliens", are concerned with specific proceedings where there are specific "parties" to a hearing or examination. In the *general* grant of investigative power in Section 235(a), it was neither necessary nor appropriate nor readily feasible to attempt some general description of all persons who might be potential "parties," as distinguished from other "witnesses." The latter term aptly covers the field.

B. The language of Section 235(a), granting the subpoena power for administrative investigations by referring generally to "witnesses," follows the pattern of many statutes beginning with Section 12 of the Interstate Commerce Act of 1887, 26 Stat. 743. These cognate provisions have not been

deemed inapplicable to persons who might, following the investigation, become "parties" to some resulting hearing, whether administrative or judicial. On the contrary, the cases defining the scope of the subpoena power characteristically involve such persons or corporations and proceed on the solidly justified premise that these "witnesses" are reached by this statutory term. *E. g., Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186; *Durkin* v. *Fisher*, 204 F. 2d 930 (C. A. 7). As in other administrative inquiries and in grand-jury investigations, the power to issue a subpoena is not dependent on whether the person whose testimony is sought may ultimately be claimed to have violated the law. If he has or may have evidence pertinent to the investigation, he is a "witness" and can be compelled to appear before agency investigators.

C. There are other infirmities in the reasoning of the court below. While it excludes from the term "witnesses" a person who is under investigation for possible naturalization frauds, it fails to explain its previous holding that the same term under the narrower Section 16 of the Immigration Act of 1917 included an alien who was not only being investigated but was the subject of a deportation proceeding. *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3). The court invokes the canon of strict construction applicable to criminal statutes though there is no ambiguity here justifying decision on this basis and though the power conferred by Section 235(a) is investigative, not punitive or penal. Finally, extending the confusion of judicial

with investigative power, the court erroneously reasons that the power of inquiry under Section 235(a) will preempt the judicial denaturalization proceeding if a subpoena may require attendance of the potential "party" to such a proceeding. Actually, however, it is commonly required that administrative subpoenas be obeyed by persons against whom criminal as well as civil actions may result from evidence adduced by the inquiry. In an appropriate case, there may be bases for claims of privilege or for other objections to supplying the evidence sought. But there is no problem of this kind here, where respondent failed to present himself, and urge any such objections. *Brown* v. *United States*, 276 U. S. 134, 144. The dispositive point here is that all "witnesses" are subject to subpoena for investigations under Section 235(a), and respondent is within this class.

ARGUMENT

The opinion below recognizes (R. 18) that the Immigration and Nationality Act of 1952 vests power in designated officers of the Immigration and Naturalization Service to investigate persons who are suspected of having procured their certificates of naturalization through the concealment of a material fact or by willful misrepresentation, for the purpose of determing whether "good cause" exists to initiat revocation proceedings under Section 340(a) of that Act. (*infra*, pp. 56-57). The opinion also recognizes the power of such officers to issue an administrative subpoena

under Section 235(a) of the Act (*infra*, pp. 51-53) in connection with such investigation. To this extent the court below is in agreement with the Court of Appeals for the Second Circuit in *Application of Barnes*, 219 F. 2d 137, now pending on writ of certiorari *sub nom. Falcone* v. *Barnes*, No. 47 this Term, and the Court of Appeals for the Fifth Circuit in *Lansky, et al.* v. *Savoretti*, 220 F. 2d 906, pending on petition for certiorari, No. 100 this Term. The actual point of difference between the *Falcone* and *Lansky* opinions on the one hand, and the opinion below on the other, is the narrow holding in this case that the "witnesses" whom immigration officers may subpoena for the preliminary investigations provided for by Section 235(a) of the Act do not include the naturalized citizen who may, if "good cause" is found, become a "party" in some future revocation proceeding.

Since, however, the petitioner in the related case of *Falcone* v. *Barnes*, No. 47, is arguing that Section 235(a) of the Act is altogether inapplicable to investigations which may lead to denaturalization proceedings and is not a source of power to subpoena *any* "witnesses" to testify in an investigation of possible naturalization frauds, we first undertake the refutation of this broad contention. Then we consider the narrower issue whether, given the power to conduct such administrative investigations, the immigration officers designated by the Attorney General can subpoena persons who may later be parties to revocation proceedings.

I

The Subpoena Power Conferred by Section 235(a) of the Immigration and Nationality Act on the Attorney General and Immigration Officers Extends to Investigation of Possible Grounds for Denaturalization

A. The plain statutory language sustains this conclusion

Section 235(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

> The Attorney General and any immigration officer * * * shall have power to require by subpena the attendance and testimony of witnesses before immigration officers * * * *concerning any matter which is material and relevant to the enforcement of this Act* and the administration of the Service * * *. [Emphasis added.]

"Certainly," the Court of Appeals recognized (R. 18), the investigation in this case is a "matter" to which the subpoena power thus granted extends. And on this point of agreement with the two other courts of appeals which have considered the problem, we think the court below was plainly correct.

The Immigration and Nationality Act for the first time combines in a single statute the subjects of immigration, nationality, and naturalization, which had theretofore been covered by separate statutes, amended at differing times. The Act eliminated a complicated superstructure of amendments, substitutes, repeals, and repetitive material,

and established a self-contained body of law covering, almost completely, the entire subject matter.[1] Where the statutory language makes reference to the context of the entire statute it uniformly refers to "this Act". *E.g.*, Secs. 101(a)(18); 101(e) and (f); 103(a); 104(a); 105; 215(g); 236(c); 241(a)(2); 246(b); 290(a); 313(b).[2] Where a qualification or cross-reference is meant to apply only to a particular title, chapter, section, subsection, or paragraph, or a lesser included part of the entire Act, the statutory language so states: *E.g.*, Secs. 222(e); 223(e); 233(d); 236(a); 284; 329(d). Thus, while some provisions of the Act refer only to the particular subject headings under which they appear, the provisions referring to "this Act" cut across and are made applicable to the entire field covered by the Act. Section 235(a) is such a provision.

Since "this Act", to the whole of which the subpoena power in Section 235(a) applies, includes provisions for the cancellation of naturalization certificates obtained by concealment of a material fact or by willful misrepresentation (Section 340(a), *infra*, pp. 56-57),[3] it necessarily follows

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[1] See United States Code, Congressional and Administrative News, 1952, 82nd Cong., 2d Sess., "Immigration and Nationality Act", pp. 2777-2778.

[2] The enacting provision of the Act provides "That this Act, divided into titles, chapters, and sections according to the following table of contents, may be cited as the 'Immigration and Nationality Act.'"

[3] Section 340(a) has been implemented by regulation as follows (8 C.F.R. 340.11):

> Whenever it appears that any grant of naturalization may have been procured by concealment of a material

that an inquiry as to the existence of such concealment or misrepresentation concerns a "matter which is material and relevant to the enforcement of this Act * * *." Conforming to the broad subject matter of the power, the grant is made, not merely to subordinate or specialized officers, but to the "Attorney General and any immigration officer * * *." The Attorney General is "charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens," and he may delegate to officers or employees of the Immigration Service or Department of Justice "any of the duties and powers imposed upon him in this Act * * *." Section 103(a), *infra*, pp. 50-51. And the "immigration officer" upon whom the subpoena power is specifically conferred by Section 235(a) is defined in Section 101(a) (18) of the Act as follows:

> The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the At-

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fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings shall be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

torney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.[4]

Thus, the subpoena power relates to the whole range of matters connected with enforcement of the Act and is appropriately confided in the officers whose responsibilities cover this range. On the specific matter of denaturalization, Section 340 (a) requires that, "upon affidavit showing good cause therefor," proceedings to revoke naturalization shall be brought by the United States attorney in the appropriate district. There is, of course, no doubt, even apart from the Attorney General's paramount authority and responsibilty under Section 103(a) of the Immigration Act itself, that denaturalization proceedings, like all activities of the United States attorneys, are conducted under the Attorney General's supervision (28 U.S.C. 507 (b)), and that such cases, like all others "which United States attorneys

[4] By regulation (8 C.F.R. 1.1) the term "immigration officer" is further described as follows:

(9) The term "immigration officer" means—

(i) Any officer or employee of the Service who, on December 24, 1952, was serving under appointment theretofore made to the position of immigrant inspector, patrol inspector, investigator, naturalization examiner, or any other officer of the Service of a higher grade, whose appointment has not terminated, or who hereafter is appointed to such position; and

(ii) Any person designated by the Commissioner to perform the duties and exercise the powers of an immigration officer as set forth in the Immigration and Nationality Act.

may be by law authorized to conduct," may be conducted by the Attorney General or his delegate (5 U.S.C. 310). The conclusion is inescapable that the Attorney General or an officer he designates is authorized and required to enforce the provisions for denaturalization and to determine in any case whether there is "good cause therefor * * *." And this is merely another way of stating the point that the investigation involved here concerns a matter to which the subpoena power in Section 235(a) extends.

Because Section 235(a) is labelled "Inspection by Immigration Officers" and occurs in a chapter headed "Provisions Relating to Entry and Exclusion" under the title "Immigration," it has been suggested that the subpoena power should be read as limited to investigations concerning the entry and exclusion of aliens. See *Application of Barnes*, 116 F. Supp. 464, 467 (N.D.N.Y.) and *In re Oddo*, 117 F. Supp. 323, 324 (S.D.N.Y.), both reversed in *Application of Barnes*, 219 F. 2d 137 (C.A. 2), pending on certiorari *sub nom. Falcone v. Barnes*, No. 47 this Term. But there are several points, detailed by the Second Circuit in the foregoing decision, which decisively answer this suggestion. In the first place, it is a salutary rule, recognizing the realities of legislative draftmanship, that captions and headings, while they may serve as guides in resolving ambiguities, "cannot limit the plain meaning of the text." *Brotherhood of Railroad Trainmen v. B. & O. R. R. Co.*, 331 U.S. 519, 528-529. The suggestion considered here

would most drastically "limit" the text of Section 235(a) by simply excising words which were deliberately added to supply the breadth on which three courts of appeals have agreed. For the Section, after granting the subpoena power for matters "relating to the privilege of any person to enter, reenter, reside in, or pass through the United States", adds that the power may also be employed for inquiries "concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, * * *." The first of these quoted clauses would obviously have been sufficient had the power been intended to relate only to the entry and exclusion of aliens. Even apart from the legislative history discussed below (pp. 17-21), showing the purposeful addition of the second clause, this added language could not fairly be stripped of meaning without an impossible showing that its presence in the Act was attributable to legislative inattentiveness or carelessness.

The point is vividly demonstrated by comparing Section 235(a) with the provision from which it was derived and which it superseded, Section 16 of the Immigration Act of 1917 (39 Stat. 885, 8 U. S. C., 1946 ed., 152). That section provided for the issuance of subpoenas by district directors and inspectors in charge simply for matters "touching the right of any alien to enter, reenter, reside in, or pass through the United States * * *." It was in terms limited to inquiries concerning immigration and deportation. Suiting

this limitation, it conferred the power upon officers concerned with these matters. So the deliberate changes effected by the new Act—the all-inclusive language upon which we rely and the grant of the subpoena power to the Attorney General, whose responsibilities are coextensive with the Act—would have to be viewed as pointless to sustain an argument that Section 235(a) applies only to matters involving entry, exclusion, and deportation of aliens. There is no ground for such a view.

In short, we submit that, even on the basis of textual analysis alone, the court below, the Second Circuit, and the Fifth Circuit were clearly correct in holding that Section 235(a) grants the subpoena power for investigation of possible grounds for denaturalization.

B. *The legislative history and administrative background further support the construction required by the terms of the statute*

Legislative history buttresses the usual and proper assumption that Congress meant what it said—that the investigative subpoena power under Section 235 (a) applies to all matters connected with enforcement of the Act. Two detailed analyses of the legislation were prepared for the responsible committees of Congress by the Immigration and Naturalization Service while the measure was in its formative stage.[5] Since the Service

[5] On July 26, 1947, the Senate passed Senate Resolution 137 (80th Cong., 1st sess.), which directed the Senate Committee on the Judiciary to make a full and complete investigation of the entire immigration system. This study was completed

suggestions affecting the present subject were for the most part adopted almost verbatim by Congress, they are persuasive aids to construction. In the document entitled "Original of Analysis on S. 3455, a Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, and For Other Purposes",[9] there appears the following discussion of Section 235 (a) (pp. 235-4 and 235-5):

> The second objective which the Service would like to see accomplished in connection with this subsection [Section 235 (a)] is to provide specific authority to administer oaths and to question not only aliens who seek to en-

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and a comprehensive report of the Committee's findings was published almost three years later, on April 20, 1950, as Senate Report 1515 (81st Cong., 2d sess.). There followed the series of bills leading ultimately to the Act of 1952. On April 20, 1950, Senator McCarran introduced S. 3455 (81st Cong., 2d sess.), which was referred to committee. Following further study, Senator McCarran introduced a revised bill (S. 716, 82d Cong., 1st sess.) incorporating various changes suggested by the Immigration and Naturalization Service. A companion bill (H.R. 2379, 82d Cong., 1st sess.) was introduced in the House of Representatives on February 5, 1951. Further versions of the Bill were introduced in the Senate on August 27, 1951, as S. 2055 (82d Cong., 1st sess.) and in the House on October 9, 1951, as H.R. 5678 (82d Cong., 1st sess.). On January 29, 1952, Senator McCarran introduced S. 2550 in the second session of the 82d Congress. The final draft, which was enacted, was designated H.R. 5678.

[9] This volume and a similar analysis of S. 716 were lodged by the Department of Justice with the Librarian of the Supreme Court for use in *Shomberg* v. *United States*, 348 U.S. 540, and *United States* v. *Menasche*, 348 U.S. 528. See 348 U.S., at 534. These documents were adverted to in the legislative reports. See, *e.g.*, H. Rep. No. 1365, 82d Cong., 2d sess., p. 28; S. Rep. No. 1137, 82d Cong., 2d sess., p. 3.

ter the United States, but also nationals of the United States, and to compel testimony by subpoena in such cases. It is believed that it is the intent of this section to accomplish that purpose, but the Service believes that certain amendments of language are necessary in order that there may be no doubt concerning the authority of Service officers in these respects. We also wish to see the power to administer oaths and to take and consider evidence extended to any matter which is material and relevant to the administration of this Act and of the Service. We have in mind in that regard the fact that under administrative regulation contained in 8 C.F.R. Part 95 there are provisions for disciplinary action against attorneys and other persons authorized to practice before the Service and the Board of Immigration Appeals. There is doubt whether under existing law any officer of the Service has the authority to administer oaths and take evidence or compel testimony in such cases.

To attain the foregoing objectives and clarify in other respects the application of subsection (a) it is recommended that the following amendments be made:

* * * * *

On line 2, page 78, delete the words "Such officers" and insert in lieu thereof the language "The Commissioner and any immigration officer including special inquiry officers.".

On Line 4, page 78, change the word "alien" to "person".

* * * * *

On line 19, page 78, change the word "alien" to "person".

On line 20, page 78, following "United States," insert "or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service,".[7]

In the document entitled "Initial Draft of Report on S. 716, Chapters 4, 5, 6 and 7 of Title II", prepared by the Service for use of the two congressional committees at the time the bill which became the final Act was being considered, it was stated (pp. 235-3 and 235-4):

It is to be noted that section 235(a) specifically provides that not only immigration and

[7] The omnibus bill, originally introduced on April 20, 1950, as S. 3455 (81st Cong., 2d sess.), would have limited the investigative subpoena power to matters "touching the privilege of any alien to enter, reenter, reside in, or pass through the United States." Following the submission of the above analysis, S. 716 (82d Cong., 1st sess.) was introduced on January 29, 1951, incorporating in principal part the changes recommended by the Service. Where the word "alien" appeared in certain places in the original bill, the word was changed to "person". The subpoena power was made applicable to the administration of the Act and the Service generally. In one respect, the Senate framers made Section 235 (a) even broader than the Service recommendation. The new bill granted the subpoena power to "the Attorney General and any immigration officer, including special inquiry officers," rather than to "the Commissioner and any immigration officer including special inquiry officers."

special inquiry officers but also the Attorney General shall have the power to administer oaths, to take evidence, and to issue subpoenas. By vesting such powers in the Attorney General, this will make certain that the Attorney General will be in a position to delegate such power to any employee of the Service, as provided in section 103.

* * * * *

In addition, this subsection contains a provision permitting inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act and the administration of the Service. These provisions will be of great value in connection with such matters, as, for example, investigation of applications for admission to practice as attorneys or representatives before the Service and the Board of Immigration and Appeals.

While denaturalization proceedings were not specifically referred to, the recommendations of the Service, on which Congress acted, demonstrate that the subpoena power was designedly broadened to include general investigative functions committed to the Attorney General beyond those relating to the entry and exclusion of aliens. And there can be no question that these functions include inquiries of the kind involved here.

In denaturalization matters, the Immigration and Naturalization Service has historically been, and has been known by Congress to be, the investi-

gative arm of the Attorney General, assigned to determine whether there exists the "good cause" which requires that an action for revocation be brought. The history of this relationship between the Service as investigating agency and the United States attorneys as prosecutors goes back to 1906. Although the courts exercised their equitable powers to revoke naturalization decrees for fraud before there was any specific statutory authority for them to do so,[8] Congress first dealt with the denaturalization process in Section 15 of the Act of June 29, 1906, 34 Stat. 601, which imposed "the duty" on United States district attorneys, "upon affidavit showing good cause therefor," to institute denaturalization proceedings. This Act, by requiring the filing of naturalization records in a central file in the Bureau of Immigration and Naturalization, also for the first time made denaturalization proceedings administratively feasible since naturalization records had theretofore been kept only sporadically by the courts.[9] In fact, the 1906 Act was passed in response to complaints of widespread naturalization frauds which were not being systematically or uniformly detected. See *Knauer v. United States*, 328 U.S. 654, 672, fn. 11.

Following passage of the 1906 Act the Bureau

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[8] See Cable, *Loss of Citizenship* (1943), pp. 3-4; Roche, *Pre-Statutory Denaturalization*, 35 Corn. L. Q. 120.

[9] See Cable, *supra*, note 8, pp. 3-4; Roche, *supra*, note 8, p. 137.

of Immigration and Naturalization [10] undertook, not only to administer the naturalization laws up to the point of the judicial hearing, but also to detect and investigate possible illegality and fraudulent procurement of naturalization decrees after rendition. Where denaturalization was sought on the ground of illegality or fraud, it was the Bureau which usually executed the affidavit of "good cause",[11] which was forwarded to the responsible United States Attorney for use in connection with possible judicial proceedings. Section 1565.6(b), *The Nationality Manual*, Govt. Printing Office (1944); Cable, *Loss of Citizenship* (1943), p. 19.[12]

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[10] In 1913, this bureau was transferred to the Department of Labor and split into two separate bureaus, one to administer the immigration laws and the other to administer the nationality laws. In 1933, the two bureaus were again consolidated into the Immigration and Naturalization Service, which in 1940 was transferred to the Department of Justice. See S. Rep. No. 1515, 82d Cong., 2d sess., pp. 290-291.

[11] Where cancellation was based on fraud evidenced by the resumption of residence in a foreign country after rendition of the naturalization decree, Section 15 of the 1906 Act, 34 Stat. 601, contemplated that the American diplomatic or consular officers in the foreign country involved would make the initial administrative investigation looking toward the possibility of future denaturalization, and that such information would be forwarded through State Department channels to the Department of Justice. Cf. *United States* v. *Luria*, 184 Fed. 643 (S.D. N.Y.), affirmed, 231 U.S. 9. Such correlative investigative jurisdiction between the State Department and the Immigration and Naturalization Service has been carried forward into Section 349(d) of the Act of 1952, 66 Stat. 261.

[12] Between 1918 and 1940, the Commissioner of Immigration was given concurrent authority with the United States Attorney to institute the judicial revocation proceedings, S. Rep. No. 388, 65th Cong., 2d sess., p. 3. When the Service

The Bureau maintained the naturalization records in its central files and had constant access to intelligence through which such frauds could be discovered.

By the period of the 1930's the investigative tasks of the Immigration Service had increased to such proportions that it was necessary to establish a Special Investigative Unit in the Department of Labor to detect nationality frauds and provide a factual basis for the institution of cancellation proceedings.[13] A further increased investigative load was created in 1940 when the basic nationality laws were revised and codified and the functions of the Immigration and Naturalization Service were transferred to the Department of Justice. The Service continued to initiate denaturalization proceedings when, on investigation, its officers detected fraud or illegality in the procurement of citizenship.[14]

The next pertinent change in the nationality law was the promulgation of Section 25 of Title I of the Internal Security Act of 1950 (64 Stat. 1013, 1014), which amended the 1940 Nationality Act to provide that membership in a subversive organization within five years after naturalization would be pre-

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was brought under the Department of Justice, this litigating function of the Service was terminated.

[13] See Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1936, p. 94; Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1939, pp. 103-104; Cable, *Loss of Citizenship* (1943), p. 19.

[14] Annual Report of the United States Immigration and Naturalization Service, 1946-47, p. 23.

sumptive evidence of ineligibility at the time of the decree.[15] This security program necessitated post-naturalization investigations by the Service on an extensive scale. During the fiscal year ending June 30, 1952, for example, there were 1,824 investigations made to determine whether evidence existed to support cancellation proceedings. Annual Report of the Immigration and Naturalization Service for Fiscal Year Ending June 30, 1952 (p. 56). See also Annual Report of the Immigration and Naturalization Service for Fiscal Year Ending June 30, 1951, pp. 43-44.

Congress broadened the area of administrative investigation in considerable degree in the 1952

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[15] This Amendment provided in pertinent part as follows:

"(d) If a person who shall have been naturalized after January 1, 1951, shall within five years next following such naturalization—

"(1) become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of this section; or

"(2) become a member of any organization, membership in which at the time of naturalization would have raised the presumption that such person was not attached to the principles of the Constitution of the United States and not well disposed to the good order and happiness of the United States, under the provisions of this section

it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by fraud or illegal procurement."

A. For the purpose of investigation, any person having knowledge of relevant facts is a "witness".

In our view, the critical error of the court below lies in its failure to distinguish between administrative *investigations*, like the ones for which the subpoena power is provided in Section 235(a), and administrative or judicial *hearings*, where "parties" are involved and the objective is a litigated decision of some sort. In describing the investigation involved here, the court below employs terms appropriate in describing a formal hearing (*e.g.*, "such a party as appellant", "administrative pretrial", "administrative inquiry instituted with a view to depriving him of citizenship", etc.), but plainly unsuited to the kind of preliminary inquiry actually in question. Although the opinion lays stress on the caption of the subpoena, "In re Abraham Miniker", that identifying label does not transform the investigation into a hearing; it merely identifies this investigation and distinguishes it from others. What the investigation seeks is facts which may or may not be the basis for future action. It involves no parties or controverted issues of fact. In itself, it results in no adjudication or "decision" of any kind.

It may be helpful in this connection to outline briefly the nature and purpose of the investigative process involved in this case: The Investigative Section of the Central Office of the Service supervises and directs the investigative work of the 16

Act both as to naturalization and denaturalization.[16] The basis for revocation was changed from fraud or illegality to proof that naturalization had been procured "by concealment of a material fact or by willful misrepresentation." Section 340(a), *infra*, p. 56.[17] Membership in certain subversive organizations within five years after naturalization was made prima facie evidence of concealment of a material fact or willful misrepresentation. Section 340(c), *infra*, pp. 57-58. The congressional intent to deprive or divest subsersives and criminals of citizenship fraudulently obtained is manifest throughout the congressional reports.

And Congress provided for administrative powers and duties sufficient to cope with the problem. Thus, when Congress found that only about 5% of the petitions for naturalization were being investigated by the Service (the other 95% being supported by the testimony of witnesses at the preliminary hearing)[18] it provided in Section 335(a)

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[16] See S. Rep. No. 1137, 82d Cong., 2d sess., p. 3:

"In addition to making numerous technical and minor changes in our immigration and naturalization laws, the instant bill makes several significant changes. Among these are the following:

. . . . . .

"(6) Naturalization and denaturalization procedures are strengthened to weed out subversives and other undesirables from citizenship."

[17] Congress evidently made this change because of a confusion in many cases as to what constituted fraud, and because of the difficulty of proof under the prior standard. See S. Rep. No. 1515, 81st Cong., 2d sess., p. 769.

[18] See S. Rep. No. 1515, 81st Cong., 2nd sess., p. 739.

and (b) of the 1952 Act for a neighborhood investigation of the applicant for citizenship in every case unless waived by the Attorney General, and gave designated officers of the Service power "to require by subpena the attendance and testimony of witnesses, including petitioner * * *." It would have been incongruous, while broadening the general investigative power of the Service in the field of naturalization, to make no comparable provision for administrative investigation and detection of naturalization frauds at a time when the area of, and necessity for, post-naturalization investigation was being so sharply increased beyond prior legislation. Section 235 (a), in its general grant of subpoena power for inquiries related to enforcement of the Act, rounds out and fulfills the purpose of Congress.

Cognizant of the requirement that the evidence to justify denaturalization be "clear, unequivocal, and convincing" (*Schneiderman* v. *United States*, 320 U. S. 118, 125; see S. Rep. No. 1515, 81st Cong., 2d sess., p. 762), and seeking broader and more vigorous enforcement of its rules to revoke naturalization decrees unlawfully procured, Congress was informed that the vesting of subpoena power in the Attorney General would "make certain that the Attorney General will be in a position to delegate such power to any employee of the Service" and that Section 235(a) would permit "inquiry under oath and by subpoena concerning any matter relevant to the enforcement of this Act and the ad-

administration of the Service (see *supra*, pp. 18-21). A special provision relating solely to post-naturalization investigations would have been superfluous. It seems clear that Congress intended that the subpoena power conferred by Section 235(a) would extend to all administrative investigations conducted by the Attorney General and the Service under him, including the well-known function of investigating whether good cause existed for recommending institution of a suit for cancellation of citizenship.[19]

We recognize, of course, that the power to issue investigative subpoenas is not lightly to be inferred from inexplicit language of general import. Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111; *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363-364. But here we have the power drawn in explicit terms to correspond in a functional way with the increased investigative duties of the Attorney General and the Immigration and Naturalization Service. There is therefore every indication that the literal terms of Section 235 (a) were designed to be followed. The 1952 Act was the product of three years of Congressional consideration, and followed

[19] There are, of course, other administrative investigations which the Service is obligated to make to carry out its functions under the 1952 Act which are not covered by any specific provision of the Act. Some of these include anti-smuggling and stowaway operations, visa and passport fraud operations, and general investigation of criminal activity having possible bearing on the Act. See the chapters entitled "Investigation" in the Annual Report of the Attorney General for 1952, at pp. 464-469, and the Annual Report of the Attorney General for 1953, at pp. 490-493.

"a most intensive and searching investigation and study of our entire immigration and naturalization system." H. Rep. No. 1365, 82d Cong., 2d sess., p. 27; see also S. Rep. No. 1137, 83d Cong., 2d sess., p. 2; S. Rep. No. 1515, 81st Cong., 2d sess. Aside from the analyses of proposed changes submitted to the committees of both houses of Congress by the Immigration and Naturalization Service (see *supra*, pp. 18-21), technical experts of the Service worked in liaison with those committees (H. Rep. No. 1365, *supra*, pp. 27-28; S. Rep. No. 1137, *supra*, pp. 2-3). This cooperation between the administrators and Congress is reflected not only in the substantive changes in the Act, but in the reorganization and consolidation of the functions of the Service and the revamping of procedures to meet the needs of the new legislation.

In view of this background, there can be no reason to narrow the plain language of Section 235 (a). The "enforcement of this Act" not only includes denaturalization investigations as a matter of semantics, but was obviously intended to include this area of special Congressional concern. It is clear—as the three courts of appeals which have had the problem all agree—that the subpoena power, granted generally in aid of such enforcement, is available for investigations of this type.

II

The Administrative Subpoena Provided For in Section 235(a) May Issue Against Any Witness in a Naturalization Fraud Investigation Regardless of the Possibility That He May, If Good Cause Be Found, Be a Party to a Judicial Revocation Proceeding in the Future

Recognizing the general subpoena power of the Service in denaturalization matters, the opinion below holds that the term "witnesses" in Section 235(a) includes only third persons having no direct interest in the outcome of the investigation, and excludes persons in the position of the respondent Minker, who, should good cause be shown therefor, might be the subject of a future judicial revocation proceeding. It reaches this conclusion by equating an interested witness in an investigation with a "party" in a judicial proceeding, or in an adversary administrative "hearing" where adjudicative action results, and by reading "witness" to exclude such a "party."

We submit that this construction is erroneous. We shall undertake to show that the investigative subpoena power under Section 235(a) reaches all persons whose testimony might be material and relevant to an authorized investigation, regardless of their possible interest in its outcome; that such persons are "witnesses" in the sense in which that term is customarily used under cognate administrative investigation provisions of other federal statutes; and that no reason exists to construe the term differently in this statute.

field offices throughout the country.[20] Frequently it will pass on to the field offices information which may be material to the enforcement of some part of the Act or to the administration of the Service.[21]

[20] The duties of this office were described by the Senate Committee on the Judiciary as follows (S. Rep. No. 1515, 81st Cong., 2d sess., p. 296):

> This section is responsible for supervising and directing (1) investigation of the cases of aliens believed to be in the United States illegally; (2) investigation of suspected violations of penal provisions of the laws, the enforcement of which is the responsibility of the Immigration and Naturalization Service, that criminal proceedings shall be instituted when violations have been established; (3) investigation of applicants for naturalization to determine whether the requirements for naturalization have been met; (4) all other investigative work of the Immigration and Naturalization Service, irrespective of whether such work originates from the application of the immigration laws, nationality laws, or other laws administered by the Immigration and Naturalization Service; (5) apprehension of aliens who are subject to deportation; and (6) maintenance of records on known and suspected smugglers and their operations.

[21] This relationship was described in the Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1953, p. 57, as follows:

"Coordination, supervision, and planning of Service investigative activities have been emphasized. These have been attained in a large measure by a uniform system of investigative reporting. Reports of investigations submitted periodically to the Investigations Division of the Central Office during the pendency of the investigation in the more important types of cases involving subversives, racketeers, narcotic peddlers, and other criminals, and the information reflected in these reports has been correlated with other information furnished by government intelligence agencies, legislative investigating committees, and other sources accessible to the Central Office. Analysis and dissemination to the Field Offices of this correlated information has enabled the investigative arm of the Service to deal more effectively with prob-

The regulation implementing Section 340(a) of the Act—the denaturalization provision—provides in part (8 C. F. R. 340.11):

> Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by willful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. * * *

An investigation in such a case is authorized by the district director only if he "is satisfied that a prima facie showing has been made that grounds for revocation exist" (*ibid.*).

At this point the probability is that the subpoena power granted under Section 235(a) of the Act will not be exercised. Most witnesses, including the witnesses who might be the subject of a future cancellation proceeding, appear voluntarily in response to the director's letter asking them to appear. They often can explain away apparent discrepancies and inconsistencies so that the investigation is closed.[22] The subpoena power is used,

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lems nation-wide in scope, such as subversive activities, organized crime, or organized rings for the production and use of fraudulent entry documents."

[22] As a matter of fact, the number of investigations has far outnumbered the number of revocations. For example, during the fiscal year ending June 30, 1952, the Service completed a total of 1,824 investigations which sought to determine possible grounds for revocation of naturalization on subversive grounds. See Annual Report of Immigration and Naturalization Service for Fiscal Year Ending June 30, 1952, p. 56. Despite this large number of investigations, the number of

however, if witnesses do not appear or produce records.

Following a full field examination, the district director is required by regulation to "report the facts in writing to the Commissioner with a recommendation as to whether revocation proceedings should be instituted" (8 C. F. R. 340.11, *infra*, pp. 59-60). As a practical matter the report goes to the Office of the General Counsel of the Service where it is further studied. There, if sufficient grounds are shown, an "affidavit showing good cause" (see Section 340(a) of the Act, *infra*, p. 56) is prepared and executed, and is forwarded as an aid to the formal judicial proceedings which may be brought in the district where the naturalized citizen resides "at the time of bringing suit."[23]

Thus, the investigation is sometimes preliminary to the judicial proceeding under Section 340(a), frequently a means of determining that there is no occasion for a proceeding, but always—the important point here—separate and different from such action. Often it is merely an opportunity for the interested party to explain facts which will result in closing the case. And the most that can result

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actual cancellations in the next two succeeding years, on grounds other than residence abroad within five years after naturalization, was extremely small. In the fiscal year 1953 there were only eight such cancellations, and in 1954 there were only fifteen. Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1954, p. 50.

[23] See the Annual Report of the Immigration and Naturalization Service for the Fiscal Year Ending June 30, 1953, p. 59; *id.* for 1954, p. 43.

from the investigation is an intra-departmental recommendation that good cause exists to institute future judicial action. This investigative procedure is in no sense an "administrative pretrial."

The person about whom inquiry is made is as much a "witness" as anyone else who appears voluntarily or who is served with an investigative subpoena. His role, like that of any other witness, is to assist a fact-gathering process. Prior to the determination of whether any controversy exists between the naturalized citizen and the Immigration and Naturalization Service, it is impossible to consider the person investigated as a "party".

The demarcation line between the investigating and the adjudicating functions of administrative agencies generally has been clearly defined in recent years [24] and was familiar to the framers of the 1952 Act.[25] The distinguishing characteristics of

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[24] See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 199-201; *Edwards* v. *United States*, 312 U. S. 473, 481; *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557, 560 (C.A. 5); *Tobin* v. *Banks & Rambaugh*, 201 F. 2d 223 (C.A. 5), certiorari denied, 345 U. S. 942; *N. L. R. B.* v. *Anchor Rome Mills*, 197 F. 2d 447 (C.A. 5); *Genecov* v. *Federal Petroleum Board*, 146 F. 2d 596, 598 (C.A. 5), certiorari denied, 324 U. S. 865; *Woolley* v. *United States*, 97 F. 2d 258, 262 (C.A. 9); *In re Securities and Exchange Comm.*, 84 F. 2d 316 (C.A. 2), reversed for mootness, 299 U. S. 504; Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 Mich. L. Rev. 775, 784-785; Davis, *The Administrative Power of Investigation*, 56 Yale L. J. 1111, 1120-26; Davis, *Administrative Law* (1951 ed.), pp. 93-117, 120-136.

[25] The former practice of combining in an immigrant inspector both investigative and adjudicative functions was subjected to criticism by various authorities adverted to in the

the investigative subpoena power granted under an analogous statutory provision were described by this Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, as follows:

> The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

And again in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642-643, this Court said:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a

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opinion of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 36-48. Although it is not governed by the Administrative Procedure Act, the 1952 Immigration Act followed the "separation of functions" philosophy of Administrative Procedure Act Section 5(c) in many particulars. See *Marcello* v. *Bonds*, 349 U.S. 302, 307-310.

case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

See also the opinion of Judge Minton in *Bowles v. Baer*, 142 F. 2d 787, 788-789 (C. A. 7):

* * * Investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone. Investigations, such as this by the OPA, have no parties and are usually held in private, just as a grand jury carries on its investigations in private. * * *

On the other hand, in a hearing there are parties, and issues of law and of fact to be tried; and at the conclusion of the hearing, action is taken which may materially affect the rights of the parties. Hearings are usually open to the public. The parties are entitled to be present in person and by counsel and to record the proceedings or be provided with a record by the hearing body. The parties to a hearing are entitled to participate therein, to argue, and to brief their case, and, if findings of fact and an order are made, they are entitled to be furnished copies.

Following the pattern of this universally recognized distinction between the investigative and the adjudicative powers of administrative agencies, there is a clear distinction between Section 235(a) of the Act, granting the subpoena power in respect to the investigative duties of the Service, and other provisions granting the subpoena power in respect to formal hearings. In Section 235(a) the subpoena power extends to "witnesses" generally. As we have pointed out, everyone who has relevant testimony to give is a "witness" for purposes of an investigation, and there is no occasion to draw a distinction between "witnesses" on the one hand and "parties", or aliens, on the other. In other sections of the Act, however, when the subpoena power is granted for a particular type of hearing, it is entirely natural that such a distinction should be drawn. Thus, there is no such significance as the court below found in the fact that four other subpoena provisions of the Act, three concerned with formal hearings and one with preliminary examination on a petition for naturalization, refer separately to the "alien" or the "petitioner" on the one hand, and to "witnesses" on the other.

The two sections referring to the "alien" are concerned with deportation (Section 242(b)) and exclusion proceedings (Section 236(a)), both obviously involving the alien as a party in interest and designed for the formal determination of issues.[26] The third section (336 (d)), empowering

[26] Cf. "The Immigration and Naturalization Service" in *Federal Administrative Procedure Act*, 56 Yale L. J. 670, 697-703.

the Attorney General to appear in any naturalization court and "to call witnesses, including the petitioner", is in the same category, except that the hearing is judicial rather than administrative. The remaining provision (Section 335(b)), relating to preliminary examinations upon petitions for naturalization and authorizing the issuance of subpoenas requiring "the attendance and testimony of witnesses, including petitioner," involves equally evident reasons for the separate designation of the "petitioner". In the first place, there is in fact a "petitioner" where there has been a petition for naturalization. Moreover, in the context of this preliminary examination, where two "witnesses" have been specifically required to verify the petition (Section 334(a)), the separate reference to the "petitioner" avoids any possibility of construing the subpoena power as being confined solely to these "witnesses".

No similar considerations apply to the general subpoena power for investigative purposes conferred by Section 235(a). In connection with investigations, including the type involved here, there are no "parties" or "petitioners", and there is no occasion to describe persons called to appear and testify with anything more than the amply comprehensive term "witnesses". To be sure, substantially every investigation under the immigration and nationality laws concerns someone who may eventually be a "party" to some proceeding. But Section 235(a) contains no locution, and the court below suggests none, which would more aptly de-

scribe such persons for purposes of investigations generally than the word "witnesses". It is as true in this investigation as in the inquiry of a grand jury that there are "no defined litigants and that none may emerge from it. * * *." *Cobbledick* v. *United States*, 309 U. S. 323, 327-328; *Blair* v. *United States*, 250 U. S. 273, 282. In both instances, those called upon to give information, whatever their potential relation to any proceeding which may ensue, are fully and simply described as "witnesses".

B. *The language of Section 235(a) defining the investigative subpoena power follows the form consistently used in other, cognate statutory provisions*

Since the enactment of Section 12 of the Interstate Commerce Act of 1887,[27] the constitutionality of which was considered in *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, federal statutes granting investigative subpoena power to an administrator have used the term "witness" as an inclusive term to embrace all who might have knowledge concerning the subject-matter of the investigation and whose attendance and testimony might have value. Modern statutes authorizing the power of subpoena in aid of agency investigations almost

[27] 26 Stat. 743, c. 128. This provided in pertinent part: "* * * for the purposes of this act the Commission shall have power *to require, by subpoena, the attendance and testimony of witnesses* and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." (Emphasis added.)

uniformly use the language employed in Section 235(a) ("require by subpena the attendance and testimony of witnesses") or closely similar language.[28] So far as we have been able to ascertain, the phrase in such context has never been understood to include only witnesses who have no direct interest in the outcome of the investigation. In fact, most of the cases which deal with various aspects of the subpoena power have arisen by virtue of a challenge to agency authority by persons or corporations directly interested in an investigation who have been subpoenaed to appear and testify or produce records. See *e.g., Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501; *Durkin* v. *Fisher*, 204 F. 2d 930 (C.A. 7); *Hagen* v. *Porter*, 156 F. 2d 362 (C.A. 9), certiorari denied, 329 U.S. 729; *Zinser* v. *Federal Petroleum Board*, 148 F. 2d 993 (C.A. 5); *McGarry* v. *Securities and Ex-*

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[28] An incomplete list of such investigative subpoena provisions includes: 15 U. S. C. 49 (Federal Trade Commission Act); 15 U.S.C. 77uuu(a) (Trust Indenture Act of 1939); 15 U.S.C. 78u(b) (Securities and Exchange Act of 1934); 15 U.S.C. 79r(c) (Public Utility Holding Company Act); 15 U.S.C. 80a-41(b) (Investment Company Act of 1940); 15 U.S.C. 80b-9(b) (Investment Advisors Act of 1940); 15 U.S.C. 715h (Federal Petroleum Act); 16 U.S.C. 825f (Federal Power Act); 29 U.S.C. 161(1) (National Labor Relations Act); 29 U.S.C. 209 (Fair Labor Standards Act); 38 U.S.C. 131 (Veterans Pension Act); 42 U.S.C. 405(d) (Social Security Act); 46 U.S.C. 1124 (Merchant Marine Act); 49 U.S.C. 12(1) (Interstate Commerce Act); 49 U.S.C. 644(b) (Civil Aeronautics Act). See also *Final Report, Attorney General's Committee on Administrative Procedure* (1941), pp. 414-435; Davis, *Administrative Law* (1951 ed.) pp. 97-98.

change Comm., 147 F. 2d 389 (C.A. 10); *Fleming* v. *Montgomery Ward*, 114 F. 2d 384 (C.A. 7), certiorari denied, 311 U.S. 690.

In many administrative investigations it is difficult to predict which "witnesses" may be parties to some future adversary proceeding. The very purpose of the investigation is to make that determination after questioning everyone concerned. In this respect, administrative investigations are comparable to the proceedings of the grand jury, "which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, *supra* (338 U.S. at 642-643); see also *Kilgore Nat. Bank* v. *Fed. Petroleum Board*, 209 F. 2d 557 (C.A. 5); *Genecov* v. *Fed. Petroleum Board*, 146 F. 2d 596 (C.A. 5); *Consolidated Mines* v. *SEC*, 97 F. 2d 704 (C.A. 9); *In re Securities and Exchange Comm.*, 84 F. 2d 316, 318 (C.A. 2); cf. Sherwood, *The Enforcement of Administrative Subpoenas*, 44 Col. L. Rev. 531, 537. As in the case of a general grand jury investigation, the power to issue an administrative subpoena is not dependent on a pre-judgment as to whether the person whose evidence is sought has violated the law: *Oklahoma Press Publishing Co.* v. *Walling*, *supra* (327 U.S. at 216); *Provenzano* v. *Porter*, 159 F. 2d 47 (C.A. 9), certiorari denied, 331 U.S. 816. The only question which conditions the power to issue the subpoena

is whether the person has testimony or evidence material and pertinent to the subject matter of an authorized investigation. If he does, then he comes within the category of "witnesses" and can be compelled to appear before agency investigators.

The term "witnesses" in the context of statutory provisions granting the power of investigative subpoena has, in short, become a word of fixed meaning. In the section here involved, Congress used the term in conjunction with standard language borrowed from statutory provisions of similar function. In view of this fact, and in view of the congressional purpose to make this provision meet the needs of a greatly expanded omnibus Act covering all phases of immigration and nationality law, there is no reason to believe that Congress intended to restrict the meaning of the term "witnesses" in Section 235 (a). It is far more reasonable to conclude that Congress, choosing familiar language precisely suited to its purpose, intended to grant to the Service broad "preliminary investigative authority"[29] to be exercised within the framework of the Act and implementing regulations. Such power includes, as in the case of most other administrative agencies, the power to subpoena any person having information pertinent to the subject of inquiry—in other words, any possible "witness" at the investigative stage, whatever his future status may turn out to be.

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[29] *Oklahoma Press Publishing Co.* v. *Walling*, *supra* (327 U.S. at 213, fn. 51).

C. The construction of Section 235(a) by the court below is unsupported by any relevant criterion of interpretation

As the opinion of the Fifth Circuit in *Lansky, et al. v. Saveretti* observes (220 F. 2d 906, 909), the analysis of Section 235(a) by the court below results in a "dry * * * interpretation of a single word in a broadly comprehensive act, with the effect of greatly impairing its scope and efficiency and the further effect of defeating its underlying purpose, to discover those who have taken false advantage of the naturalization privilege and to deprive them of the fruits of their fraud". We have shown that the opinion below fails to distinguish between administrative investigative procedures and discovery procedures incident to adjudication. There are other infirmities in its reasoning.

The opinion confines itself to a holding that the term "witnesses" in the context of Section 235(a) does not include a person under investigation for the fraudulent obtaining of the indicia of citizenship. It then states (R. 21):

> We neither consider nor intimate any opinion upon any of the countless other situations in which immigration officers may undertake to require by subpoena the appearance and testimony of interested persons in administrative inquiries.

But it is difficult to perceive how the term "witnesses" in the broad context of Section 235(a)

could mean one thing as applied to naturalization fraud investigations, and another in its relationship to other investigations conducted by the Service. The term "witnesses" in the narrower context of Section 16 of the Immigration Act of 1917 (see pp. 16-17, *supra*) was deemed sufficiently broad by the court below to include within the subpoena power an alien who was not only the subject of an investigation but a party to a deportation proceeding. *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3); see also *Graham* v. *United States*, 99 F. 2d 746 (C.A. 9). Since, as we have developed above, an investigation of naturalization frauds is not an inevitable prelude to adjudicative proceedings, there is in such investigation even less reason to exclude from the category of "witnesses" the person being investigated.

Another defect in the approach of the court below is its assumption (R. 29) that a rule of strict construction is applicable to the interpretation of the term "witnesses" in Section 235(a). If there were an ambiguity here, which we deny, and if the provision specifically related to denaturalization, it could be urged that such an ambiguity should be resolved in favor of the citizen. That, however, is not this case. Aside from the decisive fact that it contains no ambiguity, the statutory language under scrutiny merely defines the general investigative subpoena power of the Attorney General and Service officers under the Act. The power is as much concerned with inquiries into fitness to practice before the Immigration Service (*supra*, pp.

18-19, 21) as it is with denaturalization questions or any of the many other matters "material and relevant to the enforcement of this Act and the administration of the Service * * *." For all of these matters, the authority conferred by Section 235(a) is investigative, not punitive or penal. Neither the language nor the history of the provision justifies importation of the canon of "strict construction of penal statutes" where denaturalization investigations are concerned, while leaving the statute to operate as it was written with respect to other matters. The language is general. It applies here. Its purpose should not be defeated by interpolating an exception Congress did not write based upon a generalization drawn from the irrelevant context of the criminal law.

Pointing out that the Act provides for revocation of naturalization only after a judicial determination attended by appropriate procedural safeguards, the court below finds reason in this fact for denying the Attorney General's power under Section 235(a) to subpoena a person who may ultimately be involved in such a proceeding (R. 19-20). Thus, the court quotes and adopts the observation of the District Court in *In re Barnes, supra,* subsequently reversed by the Second Circuit, that (R. 20):

> If the subpenas here were allowed to stand, the judicial procedure for the revocation of naturalization certificates would be preempted by administrative action, and the provisions for

> personal notice, sixty-day time period to answer in section 340(b) of the Act, would be empty words.

This observation ignores the familiar fact, noted by the Second Circuit in its reversal in *Barnes* (219 F. 2d at 143), that "administrative investigations may be and are often intended to serve as preliminaries to adversary proceedings of a judicial character to which the United States is a party * * * ." As we have noted (*supra*, pp. 33-34, fn. 22), most investigations of the type involved here do not in fact eventuate in such proceedings. But leaving this aside, the important point remains that persons who may be subject to criminal prosecutions as well as civil suits are commonly required to obey subpoenas and attend as witnesses in administrative investigations to determine whether there is occasion to charge violations. See, *e.g.*, Internal Revenue Code of 1954, Sec. 7602; Atomic Energy Act of 1946, Sec. 12(a)(3), 60 Stat. 770, 42 U.S.C. 1812(a)(3); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186; *In re Securities and Exchange Comm.*, 84 F. 2d 316, 317 (C.A. 2); *Application of Barnes*, *supra*, at 143. Such investigations have never been considered preemptive of the judicial process, for they serve only "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so." *Oklahoma Press Pub. Co.* v. *Walling*, *supra*, at 201. The ad-

ministrative and judicial proceedings are in every respect complementary to, not in conflict with, each other. Cf *United States* v. *Morton Salt Co.*, 338 U.S. 632, 643.

Of course, the person summoned in an administrative inquiry may interpose valid claims of privilege or other objections to evidence sought. But no such problem arises or has been suggested here. Respondent's minimal duty was to present himself and assert the privilege or any other objections he might have had to supplying evidence sought from him. *Brown* v. *United States*, 276 U.S. 134, 144; *Carroll* v. *Savoretti*, 220 F. 2d 910 (C.A. 5); cf. *Ex parte Irvine*, 74 Fed. 954, 960 (C.C.S.D. Ohio). As in the case of a grand jury or other administrative investigations, the dispositive point for this case is that no witness, including a person who may later become a party to a denaturalization proceeding, has an absolute immunity from attendance and testimony under Section 235(a).

We submit, in short, that the opinion below fails to establish any basis, either from the text of the Act, its history, or other general interpretative sources, for the proposition that a person investigated for possible naturalization frauds, is not a "witness" within Section 235(a). The decision of the Court of Appeals confuses the power of the Service to investigate with the power of the judiciary to revoke naturalization. It stops the fact-finding process at the threshold by depriving the Service of an important source of information, and it renders the Act far less flexible in meeting

the varying needs of an entire area of administration.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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AUGUST 1955.

APPENDIX

Pertinent provisions of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 8 U. S. C. 1101 *et seq.*, are as follows:

Section 101(a)(18):

> The term "immigration officer" means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof.

Section 103(a):

> The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens, except insofar as this Act or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform

such other acts as he deems necessary for carrying out his authority under the provisions of this Act. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this Act; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service. * * *

Section 235(a):

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to, or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or

vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any of the excluded classes enumerated in section 212. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and docu-

ments relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this Act and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

Section 287(b):

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to

whom such oath has been administered, under the provisions of this Act, who shall knowingly or willfully give false evidence or swear to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code.

Section 335:

(a) At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 336(a), an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least five years immediately preceding the filing of his petition for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes of cases as may be designated by him.

(b) The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so des-

ignated is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner for naturalization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpena the attendance and testimony of witnesses, including petitioner, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any court exercising naturalization jurisdiction as specified in section 310 of this title; and any such court may, in the event of neglect or refusal to respond to a subpena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court designated in section 310 of this title.

Section 340:

(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: *Provided,* That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does

not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(c) If a person who shall have been naturalized after the effective date of this Act shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that

such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

(d) If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material

fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

8 C.F.R. 340.11 provides:

Investigation and report: Whenever it appears that any grant of naturalization may have been procured by concealment of a material fact or by wilful misrepresentation, the facts shall be reported to the district director having jurisdiction over the naturalized person's last known place of residence. If the district director is satisfied that a prima facie showing has been made that grounds for revocation exist, he shall cause an investigation to be made and report the facts in writing to the

Commissioner with a recommendation as to whether revocation proceedings should be instituted. If it appears that naturalization was procured in violation of section 1425 of Title 18 of the United States Code, the facts in regard thereto may be presented by the district director to the appropriate United States Attorney for possible criminal prosecution.

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